

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GEORGE SHAFFER
Claimant

VS.

CITY OF TOPEKA
Self-Insured Respondent

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Docket No. **1,055,629**

ORDER

Claimant requests review of the June 4, 2012 Award by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on October 9, 2012. The Workers Compensation Director appointed Lee Kinch of Wichita, Kansas, to serve as Board Member Pro Tem in place of David A. Shufelt, who retired in September 2012.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for claimant. Sandra M. Sigler of Topeka, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant did not sustain his burden of proof that he suffered permanent impairment of function to his upper lip or gum.

Claimant requests review of the nature and extent of his disability, specifically whether claimant sustained permanent impairment for the scarring to his lip. Claimant argues he is entitled to a 3% whole body functional impairment based on Dr. Zimmerman's rating.

Respondent argues the ALJ's Award should be affirmed.

The sole issue the Board must review is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant sustained a compensable personal injury by accident on December 17, 2010, when he was chiseling out some old pipe. The chisel "came back"¹ and struck claimant in the face. The chisel completely pierced claimant's upper lip and also injured the gum. Seven stitches were required to repair the lip injury. Claimant has scars on the inside and outside of his right upper lip. The visible scar on the outside measures three to three and a half centimeters in length and one to two millimeters in width. Claimant also has a scar on his gum (claimant described it as "a bump"²) where the chisel struck after it passed through the lip.

Two physicians testified in this claim regarding claimant's permanent impairment of function. Dr. Donald Mead provided a 0% rating and Dr. Daniel Zimmerman provided a 3% impairment to the whole body based on Section 13.5 of the *AMA Guides*³ which addresses scars and skin disorders. Dr. Mead relied on other sections of the *AMA Guides* which concern neurological injury and the general definition of impairment. Dr. Mead acknowledged that under Section 13.5 of the *AMA Guides*, claimant would fall within class 1 of table 2 located on page 280 of the *AMA Guides* under which a rating of 0% to 9% to the whole body would be appropriate.⁴

The ALJ found the following:

The Court agrees with the opinion of Dr. Mead. Claimant is not suffering from any permanent impairment as a result of his work related accident. Claimant has not had any loss of physiological capabilities. Claimant describes his condition as a result of the work related accident as to having to be careful when he shaves, it is a hassle to brush his teeth and he runs his tongue over the bump on his gum. These are not limitations on Claimant's ability to function and do not constitute a permanent impairment as defined by ***The Guides***. It is found and concluded that Claimant has a zero percent impairment as a result of his work related accident.

¹ R.H. Trans. at 6.

² *Id.* at 7.

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

⁴ Counsel for both parties stipulated at oral argument that the Board may consider the portions of the *AMA Guides* relied on by Drs. Mead and Zimmerman, despite the absence of those sections of the *Guides* from the record.

The Board disagrees. The Board is persuaded by Dr. Zimmerman's testimony that claimant's scar on the upper right lip was visible and that claimant had a roughening of the gum above his seventh tooth. The scar was mildly hypertrophic. Claimant experienced numbness in the area of the scar. The scar interfered with some of claimant's activities of daily living, including shaving, brushing his teeth, eating hot or cold food, and smiling. In addition to loss of full sensation, claimant described having a feeling in his right upper lip as "droopy, a little more dead" and "it don't feel like I got full control."⁵

The Board finds that claimant sustained a 3% permanent functional impairment to the whole body and that the award is accordingly modified. The definition of "functional impairment" is defined in the Act for nonscheduled injuries as "the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Guides to the Evaluation, if the impairment is contained therein."⁶

Section 13.5 of the AMA *Guides* provides a number of factors which should be considered in assessing impairment for scars and skin disorders, including whether the scar is atrophic or hypertrophic; whether the scarring is visible; and whether the scar interferes with activities of daily living. Claimant testified that he experienced numbness in the area where the chisel passed through his upper lip. Claimant told Dr. Mead the same thing and Dr. Zimmerman found numbness in the area of claimant's scar. If there is less than full tactile sensation of the skin there is less than complete function. The Board has previously considered lack of full sensation a factor in determining whether there is functional impairment due to scarring.⁷

There is no dispute the three centimeter scar on claimant's upper lip is visible. On page two of Dr. Zimmerman's report dated May 13, 2011, he describes the appearance of the scar as "cosmetically noticeable." Both doctors agree that the scarring is hypertrophic. As noted above, the scarring interferes with a number of claimant's activities of daily living, including shaving, brushing his teeth, and smiling. The definition of functional impairments on page 1 of the AMA *Guides* speaks to a condition that interferes with activities of daily living. That definition does not require a complete inability to perform such daily activities.

⁵ R.H. Trans. at 13.

⁶ K.S.A. 44-510e(a).

⁷ See *Cobb v. Fab-Pro Oriented Polymers*, No. 1,053,786, 2012 WL 5461464 (Kan. WCAB October 31, 2012) Petition for Review filed Nov. 30, 2012, Case No. 109010; *Moore v. Waste Management of Wichita*, No. 253,839, 2002 WL 598485 (Kan. WCAB Mar. 29, 2002).

Claimant's disability is a question of fact and in making that determination the Board must consider the medical evidence as well as the testimony of claimant.⁸ The Board finds that claimant has sustained his burden to prove, by a preponderance of the credible evidence, that he sustained a 3% permanent functional impairment to the whole body as a consequence of his accidental injury and accordingly, pursuant to K.S.A. 44-510e, is entitled to permanent partial disability benefits based on that finding.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated June 4, 2012, is modified to find claimant sustained a 3% permanent functional impairment to the whole person as a consequence of his December 17, 2010 accidental injury and is entitled to permanent partial disability benefits based on that finding.

Claimant is entitled to 12.45 weeks of permanent partial disability compensation at the rate of \$487.36 per week or \$6,067.63 for a 3% functional disability, making a total award of \$6,067.63 which is owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

⁸ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

⁹ K.S.A. 2010 Supp. 44-555c(k).

DISSENT

The undersigned Board Members respectfully dissent from the opinion of the majority. Specifically, these Board Member would adopt the opinion of Dr. Mead that claimant sustained no permanent functional impairment. After recovering from his accident, claimant was left with a scar on his upper lip and a bump on his gum. Claimant testified that he had no problem chewing or biting into food and that his scar did not affect his ability to work. The only remaining effects of claimant's injury was that he had some decreased sensation to touch over the right upper and lower lip. Dr. Mead cited Chapter 1, page 1 of the *AMA Guides*, that defines impairment as "conditions that interfere with activities of daily living." Claimant could not name an activity that was limited by the scar on his lip, bump on his gum or the altered sensation. Consequently, the undersigned Board Members would affirm the Award of ALJ Sanders.

BOARD MEMBER

BOARD MEMBER

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Rebecca A. Sanders, ALJ